

RENDERED: AUGUST 26, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2010-CA-001172-MR

RICK PANNELL

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE KIMBERLY N. BUNNELL, JUDGE
ACTION NO. 06-CI-03131

ANN SHANNON AND
ELEGANT INTERIORS, LLC

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: TAYLOR, CHIEF JUDGE; CAPERTON AND WINE, JUDGES.

TAYLOR, CHIEF JUDGE: Rick Pannell brings this appeal from a May 25, 2010, Order of the Fayette Circuit Court awarding Pannell damages against Elegant Interiors, LLC, for breach of a lease agreement and absolving Ann Shannon of any individual liability. We affirm.

The facts of this case are straight forward. Elegant Interiors was organized by Shannon in 2000 as a limited liability company (LLC). Shannon was its only member. In February 2004, Shannon, on behalf of Elegant Interiors, executed a written lease agreement (February 2004 lease) with Pannell. Therein, Elegant Interiors leased 3,645 square feet of commercial space for a starting monthly rental payment of \$5,727.50. Due to its failure to file an LLC annual report and to pay a \$15 filing fee, Elegant Interiors was administratively dissolved by the Kentucky Secretary of State on November 1, 2005. Kentucky Revised Statutes (KRS) 275.295.

In March 2006, a “Release” and a second lease (March 2006 lease) were executed by the parties. Under the March 2006 lease, the rental space was decreased to 1,654 square feet, and the monthly rental payment was, likewise, decreased to \$2,598.98.

On July 21, 2006, Pannell filed the instant action alleging breach of the March 2006 lease for failure to make the required rental payments for June and July 2006. Pannell named as defendants both Elegant Interiors and Shannon. Pannell sought to hold Shannon individually liable for breach of the March 2006 lease. During pendency of the action, Elegant Interiors’ dissolution was cancelled by the Kentucky Secretary of State, and the limited liability company was reinstated by the Secretary of State on August 11, 2006. KRS 275.295.

Shannon filed a motion for summary judgment arguing that she was not individually liable for breach of the March 2006 lease as Elegant Interiors was

the tenant as set forth under the terms of the lease. As a member of the limited liability company Elegant Interiors, Shannon maintained that she was shielded from individual liability for breach of the March 2006 lease.

The circuit court granted summary judgment in favor of Shannon holding that she was not exposed to individual liability and that Elegant Interiors was the tenant under the March 2006 lease. In so holding, the circuit court reasoned:

The Court holds that, as a matter of law, the final controlling lease agreement between the parties was the lease agreement with amendments made and dated March 2, 2006. The first paragraph of this amend[ed] lease defines the “Tenant” as “Elegant Interiors, a LLC corporation” [sic]. Accordingly, the Tenant, and the party assuming the obligations of Tenant, under the amended lease remained the Limited Liability Company.

Further, the Court holds that regardless of the administrative dissolution of the LLC on November 1, 2005, pursuant to KRS 275.295(3) the reinstatement of Elegant Interiors, LLC, on August 11, 2006 (before the entry of any judgment in this matter), related back to the time of its administrative dissolution. Accordingly, the amendments to the lease on behalf of the LLC are effective “as if the administrative dissolution had never occurred.”

Thereafter, the circuit court concluded that Elegant Interiors breached the March 2006 lease and awarded Pannell damages against the entity Elegant Interiors. This appeal follows.

Pannell argues that the circuit court erred by holding that Elegant Interiors was the tenant under the March 2006 lease. Pannell maintains that

Shannon signed both the March 2006 lease and the Release in her individual capacity and not as a member of Elegant Interiors. Pannell points out that Shannon merely signed her name to the March 2006 lease and did not indicate that her signature was in a representative capacity for Elegant Interiors. Additionally, Pannell cites to the title of the March 2006 lease as “Lease Agreement for Ann Shannon” and that Shannon was the only party other than Pannell specifically identified in the Release. Pannell maintains that the parties’ intended Shannon to be the tenant and to be individually liable under the March 2006 lease.

As the circuit court rendered summary judgment upon Shannon’s individual liability for breach of the March 2006 lease, we must determine whether there existed any material issue of fact and whether Shannon was entitled to judgment as a matter of law. Kentucky Rules of Civil Procedure 56; *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476 (Ky. 1991). Our review proceeds accordingly.

It is well established that interpretation of an ambiguous contract presents an issue of law, and our review proceeds *de novo*. *Allen v. Lawyers Mutual Ins. Co. of Ky.*, 216 S.W.3d 657 (Ky. App. 2007); *Hibbits v. Cumberland Valley Nat’l Bank & Trust Co.*, 977 S.W.2d 252 (Ky. App. 1998). And, a contract must be interpreted as a whole so as to give effect to the parties’ expressed intent. *Royal Indemnity Co. v. Jenkins Constr. Co.*, 60 S.W.2d 105, 248 Ky. 839 (1933); *State Farm Mut. Auto. Ins. v. Hobbs*, 268 S.W.2d 420 (Ky. 1954). Where different instruments evidence a single transaction, these instruments are interpreted

together to, likewise, determine the parties' intent. *Veech v. Deposit Bank of Shelbyville*, 278 Ky. 542, 128 S.W.2d 907 (1939).

The contract at issue is the March 2006 lease. It is undisputed that the parties simply utilized the previously executed February 2004 lease and made minor modifications thereto, which included decreasing the amount of rental space and the monthly payment. The parties indicated their assent to these modifications by initialing same. The March 2006 lease reveals that it was executed on March 2, 2006, and concomitant therewith, the parties executed a Release dated March 2, 2006.

On the first page of the March 2006 lease, it specifically provides that the "tenant" is "Elegant Interiors, LLC." Although it states that the lease agreement is for Ann Shannon, it is clear that Shannon is not the tenant as the lease clearly identifies the tenant as Elegant Interiors. Additionally, the first paragraph of the March 2006 lease plainly states that the lease was "between Rick Pannell, landlord, . . . and Elegant Interiors . . . (Tenant)." The March 2006 lease could not be clearer – the tenant was Elegant Interiors and not Shannon.

Additionally, any argument that the Release somehow modifies the March 2006 lease and replaces Shannon individually as tenant is simply untenable.

The Release read, in part:

IT IS AGREED UPON THAT THE SIGNING OF THIS DOCUMENT BY BOTH PARTIES ASSURES THAT ANN SHANNON WILL NOT BE HELD RESPONSIBLE FOR THE BUILDING OF ANY WALLS, CONSTRUCTION, CAM COSTS, OR ANY

EXPENSES PERTAINING TO STE 140, BEGINNING TODAY, MARCH 2, 06, AND WILL BE ONLY RESPONSIBLE FOR PAYMENT OF THE REMAINING 1654 SF @ 18.00 SF [18.856 written in above 18.00 and initialed by both parties] AND KNOWN AS STE 150, LOCATED AT THE SAME ADDRESS. UPON ACCEPTANCE OF THIS DOCUMENT, A NEW LEASE WILL BE SIGNED BY ANN SHANNON, FOR THE CHANGES IN SF (1654 SF @ 18.00) [18.856 written above 18.00 and initialed by both parties] AND CAM COSTS ONLY FOR STE 150.

Essentially, the Release merely operates to set forth the material terms of the parties new agreement and to provide that a new lease would be executed setting forth such terms. Shannon did sign the Release and the March 2006 lease without indicating that her signature was within her representative capacity as a member of Elegant Interiors. However, Shannon also signed the February 2004 lease without signifying that same was in her representative capacity. It is certainly beyond cavil that Elegant Interiors was the tenant under the February 2004 lease and that Shannon signed in her representative capacity. So, it is likewise with the March 2006 lease and the Release.

Also, the March 2006 lease and the Release cannot be reasonably interpreted as imposing individual liability upon Shannon. Generally, a member of a limited liability company may assume individual liability only by “unequivocal terms” that unmistakably imposes such individual liability. Upon this issue, our Supreme Court has held:

[A]ssumption of personal liability by a member of an LLC is so antithetical to the purpose of a limited liability company that any such assumption must be stated in

unequivocal terms leaving no doubt that the member or members intended to forego a principal advantage of this form of business entity.

Racing Inv. Fund 2000, LLC v. Clay Ward Agency, Inc., 320 S.W.3d 654, 659 (Ky. 2010). Here, neither the March 2006 lease nor the Release states in “unequivocal terms” that Shannon was to be individually liable and intentionally abandons the cloak shielding her from liability as extended by Elegant Interiors. Upon the whole, we believe Elegant Interiors was the tenant under the March 2006 lease and that the March 2006 lease did not impose individual liability upon Shannon.

Alternatively, Pannell argues that Shannon is individually liable because Elegant Interiors was administratively dissolved as a limited liability company at the time of execution of the March 2006 lease. For the reasons stated hereafter, we disagree.

The undisputed facts are as follows. Elegant Interiors was organized as a limited liability company in 2000. It entered into the first lease with Pannell on February 2004. On November 1, 2005, the Kentucky Secretary of State administratively dissolved Elegant Interiors as a limited liability company for failure to file an annual report and pay a \$15 filing fee. The new lease between Elegant Interiors and Pannell was entered into on March 2, 2006, (March 2006 lease), while Elegant Interiors was administratively dissolved.¹ Subsequently, on

¹ In her disposition, Ann Shannon stated that she was unaware that Elegant Interiors, LLC, had been administratively dissolved at the time she executed the March 2006 lease.

August 11, 2006, the Secretary of State reinstated Elegant Interiors as a limited liability company.

In this Commonwealth, our legislature enacted KRS 275.295(3)(c), which provides that upon reinstatement of an administratively dissolved limited liability company:

[T]he reinstatement shall relate back to and take effect as of the effective date of the administrative dissolution, and the limited liability company shall resume carrying on business as if the administrative dissolution had never occurred.

KRS 275.295(3)(c).² This statute (KRS 275.295(3)(c)) was recently interpreted in *Fairbanks Arctic Blind Company v. Prather & Associates, Inc.*, 198 S.W.3d 143 (Ky. App. 2005).³ Therein, the Court held that KRS 275.295(3)(c) clear intent was for:

[R]einstatement to restore a corporation to the same position it would have occupied had it not been dissolved and that reinstatement validates any action taken by a corporation between the time it was administratively dissolved and the date of its reinstatement. Simply put, the General Assembly meant what it said, that upon reinstatement, it is “as if the administrative dissolution . . . had never occurred.”

² Kentucky Revised Statutes 275.295 was repealed effective January 1, 2011.

³ In his brief, Rick Pannell cited to an unpublished case of the Court of Appeals that seemingly conflicted with *Fairbanks Arctic Blind Company v. Prather & Associates, Inc.*, 198 S.W.3d 143 (Ky. App. 2005). Pursuant to Kentucky Rules of Civil Procedure (CR) 76.28(4)(c), a party may only cite to unpublished opinions when there is a complete lack of published authority upon an issue. We refer Pannell to the above CR 76.28(4)(c) and caution him to only cite unpublished opinions in accordance therewith. See *Ann Taylor, Inc. v. Heritage Ins. Service, Inc.*, 259 S.W.3d 494 (Ky. App. 2008).

Fairbanks Arctic Blind Co., 198 S.W.3d at 146. As reinstatement of a limited liability company relates back to the effective date of dissolution and operates as if dissolution never occurred, it naturally follows that members of such company are not individually liable for actions undertaken on behalf of the company during its dissolution. *See Fairbanks Arctic Blind Co.*, 198 S.W.3d 143. Hence, the subsequent reinstatement of Elegant Interiors as a limited liability company “relates back” to date of its dissolution, and Shannon cannot be held individually liable for any actions undertaken on behalf of Elegant Interiors while it was administratively dissolved.

In sum, we are of the opinion that the circuit court properly granted summary judgment concluding that Shannon was not individually liable for breach of the March 2006 lease.

For the foregoing reasons, the Order of the Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Carroll M. Redford, III
Susan Y.W. Chun
Lexington, Kentucky

BRIEFS FOR APPELLEES:

Dan M. Rose
Christopher L. Thacker
Lexington, Kentucky